compensation for program carriage (and, conversely, penalties for non-carriage) must be roughly proportional to the importance of the program in question to audience share or advertising revenues, and that the networks should not be permitted to manipulate compensation formulae to coerce carriage or impermissibly tie marginal programs to strong ones.

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The *Notice*'s proposed changes to the right-to-reject rule would be intensely regulatory, highly intrusive and disruptive of a stable business relationship, administratively unworkable, constitutionally questionable and unwise as a method to serve the public interest. These revisions would work only to diminish affiliates' ability to provide programming that best serves local audiences. They should be rejected.

B. The Option Time Prohibition Serves The Public Interest And Should Not Be Modified.

The "option time" prohibition generally provides that a network cannot require affiliates to set aside "option time" for the network — time the network has a unilateral option to program, on short notice, regardless of any contrary plans of the affiliate.[35] The *Notice*'s proposal, again, would intrude upon a workable business relationship between networks and affiliates and would be administratively unworkable. The option-time rule should be preserved in its present form.

Prior to the prohibition on option time, a network could require an affiliate to clear time set aside for the network even though programs from other sources

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[35] The "option time" rule, 47 C.F.R. § 73.658(d) (1994), prohibits a network from "optioning" an affiliate's time or engaging in practices that have "the same restraining effect as time optioning."

were displaced. "The station's power to reject network programs during option time was, for all practical purposes, severely limited. . . . This, in turn, adversely affected the affiliate's ability to construct a balanced programming schedule responsive to the needs and interests of the local community."[36] The Commission found that such practices suffer from the same infirmities as encroachments on an affiliate's right to reject programming:

> By restricting the licensee's freedom of choice, the option-time practice represents, accordingly, an abdication of his duty to program his station as he deems most in the public interest, not only as to what programs to present but at what times to present them. In view of this, we would reach the same result even if option time were not anticompetitive in effect — *i.e.*, if there were no claims by other program sources or non-network advertisers that they are excluded from the hours involved — since no advantage to the public interest appears to accrue. . . . [W]ith removal of the option-time "shield," programs will fall or stand on their own merits, without artificial protection on the one hand or exclusion on the other.[37]

Unrestricted network "options" had, then, become a means by which the networks could evade the right to reject. The option time rule was necessary to restore that ability.

It is instructive that the Commission's 16-year experiment of permitting networks to option time from affiliates (1941-1957) was an abject failure.[38] In

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36 *Barrow Report* at 132.

37 Amendment of Section 3.658(d) and (3) of the Commission's Rules to Modify Option Time and the Station's Right to Reject Network Programs, 34 F.C.C. 1103, 1128 (1963) ("*Option Time Order*").

38 Option time initially was prohibited in the *Chain Broadcasting Report*, but a supplemental report five months later permitted option time subject to certain procedural protections. *See Supplemental Report on Chain Broadcasting* 8-13 (October 11, 1941).

1957, the Commission's Network Study Staff extensively evaluated the option time practice and recommended that it be prohibited. The study found that time optioning, even with procedural protections, was contrary to the public interest:

> Without option time, affiliated stations would have greater freedom to program in accordance with their best judgment as to the interests and needs of their viewing public. Local, regional, and national advertisers would have more opportunity to compete with national advertisers using network television. It is expected that independent program producers and suppliers, and independent station representatives, would have a better opportunity to compete with the networks in their respective fields. Independent stations without network affiliation would have greater access to program fare that is competitive with that offered by network affiliates.[39]

In 1959, moreover, the Antitrust Division of the Department of Justice found that option time practices violated the antitrust laws as "exclusive dealing arrangements" and "illegal tying arrangements."[40] The Commission prohibited time optioning, finding that "[i]t would be highly inappropriate to give the networks what amounts to a limited monopoly in order simply to maintain and increase their revenues."[41]

The Commission originally prohibited option time clauses because, in its judgment, those provisions imposed serious obstacles for new networks and hindered the ability of affiliates to cultivate a local program service. The exercise of option time by the networks often prevented the regular scheduling of local

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39 *Barrow Report* at 398-99.

40 Applicability of Antitrust Laws to Option Time Practices, 18 R.R. 1801, 1805-07 (1959). Notwithstanding this infirmity, CBS persisted in claiming that option time was "a shield against natural economic forces which would otherwise threaten the destruction of networking." *Option Time Order*, 34 F.C.C. at 1111.

41 *Id.* at 1124.

programs at desirable hours. When local programming was shifted from one time period to another, resulting from a network's exercise of its time option, stations had difficulty in maintaining a regular audience and soliciting long-term advertising accounts. Hence, option time practices hampered affiliates' efforts to create and develop local commercial programming, negatively affecting their ability to serve the public interest.[42] The option-time prohibition continues to permit affiliates the autonomy that is required for local control of their stations. It further permits them to exercise their essential responsibility to select network programs rather than simply dedicate a block of time in which they would be forced to uncritically accept whatever programming a network organization decided to broadcast.

In its *Notice*, the Commission cites the promotion of new networks as a reason to abandon the prohibition on option time.[43] An affiliate, however, is charged with the duty of maintaining control of its programming. It would be difficult at best for stations to maintain an appropriate degree of control over the programming they present if networks — new or old — reserve "options" that they can exercise to require those stations to broadcast their network programming during a certain time period. Option time provisions would create uncertainty for stations that would make compliance with their nondelegable duty to maintain control over their programming very difficult.

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[42] *Chain Broadcasting Report* at 63.

[43] New networks generally do not have the funding that established networks have to commit to blocks of time of a station's broadcast day. Consequently, the *Notice* asserts, a new network may wish to reserve an option on a station's time in the event that they can raise the financial backing to develop programming to show during that time period. Such a practice, it is argued, will promote the growth of new networks rather than forcing them to commit to blocks of time that they cannot fill.

The *Notice*'s proposal to eliminate the option time prohibition suggests a mandatory notification period within which a network must decide whether to exercise its option. This notification period presumably would be designed to alleviate the uncertainty caused by lifting the prohibition on option time. This proposal, however, ignores the reality that programming typically is purchased or produced months ahead of time in anticipation of being aired by local affiliates. Any appropriate notice period would have to be sufficiently long to allow stations adequate time to carefully review proposed network programming and to go to the programming marketplace to find alternative programming which may be more appropriate for their viewing audience — often a period of eight months or more. It would be impossible to craft a "notice period" that would capture the supposed benefit of time optioning (which, of course, we believe to be entirely illusory) while permitting affiliates effectively to obtain programming to broadcast if inappropriate material is sought to be broadcast by a network on an "optioned" time block. Without an effective ability to obtain "replacement" programming, the affiliate would have little choice but to air whatever the networks wished to place in an "optioned" time block. The *Notice*'s proposal effectively would prohibit affiliates from being able to perform their essential duty of determining what programming will be presented to their communities.

In addition to discouraging affiliates from dutifully assessing the suitability of network programming for local audiences, option time provisions would actually hamper the growth of new networks by effectively limiting the time available for major network affiliates to accept programming from a new network. Consequently, almost forty years after the *Barrow Report*, it is still the case that the existing prohibition on option time provisions would promote both competition between the networks and freedom among the affiliate stations to determine which programming would best serve the public interest. The rule should be retained and the proposals in the *Notice* should be rejected.

C. THE PROHIBITION AGAINST "EXCLUSIVE AFFILIATIONS" CONTINUES TO SERVE THE PUBLIC INTEREST AND MUST BE PRESERVED.

The "exclusive affiliation" prohibition prevents networks from "preventing" or "hindering" affiliates from "broadcasting the programs of any other network organization."[44] This rule, like the option time rule, is a necessary complement to the right to reject rule:

> The important consideration is that [without such a rule] station licensees are denied freedom to choose the programs which they believe best suited for their needs; in this manner the duty of station licensees to operate in the public interest is defeated. . . . A licensee station does not operate in the public interest when it enters into exclusive arrangements which prevent it from giving the public the best service of which it is capable. . . .[45]

Importantly, the rule does not prohibit exclusive affiliations — in fact, the majority of network affiliates do have *de facto* exclusive affiliations. Exclusivity will be a part of some network-affiliate relationships in circumstances where such an arrangement makes sense in the marketplace. The exclusive affiliation rule only operates to prevent affiliates from being *required* to agree to contracts that demand exclusive affiliation. The supposed benefits of exclusive affiliations thus are available now, and nothing stands to be gained by the proposals contained in the *Notice*.

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[44] 47 C.F.R. § 73.658(a) (1994).

[45] *Chain Broadcasting Report* 52, 57; *see also Barrow Report* 133.

Much, however, does stand to be lost. As the *NERA Study* establishes, the value of a network affiliation has not diminished; it is likely that networks could, in fact, obtain commitments for exclusive affiliation if they sought them. *See NERA Study* at 8-10. Before this practice was proscribed, networks routinely inserted a provision in their standard affiliation agreements which prevented their affiliates from broadcasting programs from other networks. The Commission found that this provision operated

> [T]o hinder the growth of new networks, to deprive the listening public in many areas of service to which they were entitled, and to prevent station licensees from exercising their statutory duty of determining which programs would best serve the needs of their community.[46]

Restraint on affiliate choice of programming appropriately was condemned by the Commission as contrary to the public interest. The Commission found that the public interest was ill-served when stations were denied the freedom to choose their own programming.[47]

The networks' ability to extract exclusive affiliation commitments would have the same adverse consequences today as it had before the rule was adopted. Exclusive affiliation agreements restricted the public's choice of programming and denied licensees the freedom to choose programming they considered to be in the

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[46] Nat'l Broadcasting Co. v. United States, 319 U.S. 1001-02 (1943).

[47] *See Chain Broadcasting Report* at 52. The Commission has attempted to increase both diversity in programming and competition among networks as a way of promoting the licensee's role as a "public trustee." *Competition and Responsibility*, 35 Fed. Reg. at 7424 ("Diversity of programs and development of diverse and antagonistic sources of program service are essential to the broadcast licensee's discharge of his duty as 'trustee' for the public in the operation of his channel."). To that end, the Commission has limited network control and promoted opportunities for the development of alternative or independent programming that serves the public interest. *See id.* at 7422.

public interest and best suited to their needs. Additionally, the exclusive affiliation provisions have traditionally been viewed as unhealthy for competition between the networks, a basic consideration underlying the enactment of the Communications Act and an impetus behind the Commission's promulgation of the Chain Broadcasting Rules.[48] The untenable results of "exclusive affiliation" clauses in affiliation agreements was demonstrated convincingly by the ability of the networks to deny a substantial amount of the American population the ability to see the 1939 World Series merely because it was being carried on a competing network (*see* pages 17-18 above).

The *Notice* proposes to eliminate the current prohibition on exclusive affiliation, at least in large markets. The *Notice* claims that there are benefits in permitting exclusive affiliation (economic efficiency, increasing the ability of an affiliate to build an audience for programming it finds more profitable, and aiding terrestrial broadcast stations in differentiating themselves in a crowded television marketplace). This proposal, however, would eviscerate the diversity afforded both affiliates and viewers under the existing regulatory structure. With the return of exclusive affiliation agreements, stations could be required to accept only the programming of their designated network. This specialization of affiliates would ultimately limit the diversity of programming available to the viewing audience. Can there be any question that thousands of viewers across the United States would be denied the ability to watch NFL football, currently on the Fox network, if the three major networks had the ability to require their affiliates to eliminate all secondary Fox affiliations? Is there any question that the fledgling Warner Brothers and UPN networks would be denied access to

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[48] *See* Federal Communications Comm'n v. Sanders Brothers Radio Station, 309 U.S. 470 (1940); Application of § 3.658(a) of the Commission's Rules, 23 R.R. at 778.

audiences around the country if ABC, CBS, NBC and Fox affiliates did not have an opportunity to carry their programming as well? The lessons of the 1939 World Series undoubtedly are relevant today.

Permitting a dual affiliation is a technique that can permit some affiliates, often less profitable stations and often those in smaller markets, to obtain high-quality programming for their audiences in circumstances where it otherwise would be impossible for them to do so. Under the Commission's proposal, affiliate stations could be prevented from broadcasting alternative programming if it came from another network. Diversity of programming, particularly in smaller markets, would be diminished; competition for better programming, and the obvious benefits that competition provides, would be lost. Numerous affiliates would be required to uncritically accept programming provided to them by their network and permit other high-quality, nationally available programming to go unbroadcast in their communities. The result would be less diversity for audiences across the country.

The advent of digital television provides another reason to maintain the prohibition against exclusive affiliations. When broadcasters are providing both a digital and analog broadcast to their communities, they likely will need additional programming. In the absence of the rule, networks very well could insist that affiliates accept no programming whatsoever from any other network source for their analog *or* digital signals, thus diminishing opportunities for competition, greater diversity of programming, and for the evolution of new networks and services.

Although there may be more affiliates today that can accept the programming of new networks as a national matter, this is certainly not true in all markets. And lifting the restriction on exclusive affiliation agreements would still hinder the development of new networks.[49] In large markets, the allowance of exclusive affiliation agreements would have a strongly negative effect on the survival of new networks and the diversity of programming available to viewers. In those markets, stations that are not affiliated with the major networks are available to pick up the programming of a new network, but those stations may be nascent ones without a full day's worth of programming.[50] Stations that are already affiliated with a major network often can offer a prominent opportunity for audience development to a new network, thus greatly increasing its potential for survival and increasing competition among networks.

A further difficulty with the *Notice*'s proposal is determining which markets are "small" enough to be subject to a ban on exclusive affiliation agreements. There are relatively few markets that are so large that abandoning the prohibition on exclusive affiliation agreements would have little effect on new network programming. And markets tend to be idiosyncratic in the number of

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[49] The Commission condemned exclusive contracts as contrary to the public interest because they deny stations the freedom to choose programs that broadcasters believe are best suited to the needs of their community of license:

> Exclusive contracts, which foreclose the possibility of new networks, deprive the public of the improvement in station program content which could reasonably be expected to flow from competition by new national networks.

Chain Broadcasting Report at 52.

[50] In its report ordering the prohibition of exclusive affiliation agreements, the Commission outlined the dominance of NBC and CBS in the market for affiliate stations, noting that "by their exclusive contracts, [they have] tied up the largest stations in the most desirable markets." The Commission continued,

> Thus even where stations are available to a new network, they are, with few exceptions, locals or low-power regionals not able to compete effectively with the superior stations under exclusive contract to NBC and CBS.

Chain Broadcasting Report at 51-52.

broadcasting outlets available; population size is not a reliable determinant for whether exclusive affiliation would be harmful to the community. The *Notice*'s proposal would, again, replace a workable and non-intrusive regulation with a series of complex and intricate decisions about particular markets that should be regulated differently than others. It should not be adopted.

III. THE CUMULATIVE IMPACT OF REPEALING THE NETWORK-AFFILIATE RULES IN A YEAR WHEN OTHER REGULATORY PROTECTIONS HAVE BEEN DISMANTLED WOULD ENDANGER LOCAL CONTROL OF TELEVISION BROADCASTING.

The Affiliates agree that an inquiry into whether these rules remain relevant is appropriate and responsible and that it is important to consider the cumulative effect of all rule changes.[51] As we point out below, we agree with the Commission's proposal to modify and repeal certain of the rules being reviewed in the *Notice*. The cumulative impact of the Commission's proposed changes to the three essential network rules, however, particularly in light of the virtual transformation of the television industry during the past year, renders it certain that no change in the central network rules is appropriate.

A. THE 1995 TRANSFORMATION OF THE BROADCAST TELEVISION MARKETPLACE HAS INCREASED THE POWER OF THE NETWORKS AND REINFORCES THE CONTINUING NEED FOR THE NETWORK RULES.

There have been more proposed and realized regulatory changes in the past year than in the entire decade that preceded it.[52] In 1995 alone, the

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[51] *See Notice*, ¶¶ 51-57.

[52] Even if the central network-affiliate rules are preserved, as they should be, the pages in Chapter 47 of the Code of Federal Regulations dedicated to rules underlying the regulation of the network-affiliate relationship will have been reduced some 87 percent — from more than eight full

following long-standing regulatory policies have been dismantled, targeted for repeal, or otherwise endangered:

- **PTAR.** The prime-time access rule, which had set aside one hour of prime time for essentially non-network programming in the largest 50 markets, has been repealed.[53] After the sunset of this rule, networks will be free to attempt to obtain yet another hour of so-called "network time" from affiliates, a development that may have a significant effect upon the network-affiliate relationship.[54]
- **Fin/Syn.** The elimination of the financial interest and syndication rules now is complete, even ahead of the schedule established by a previous Commission.[55] Networks now may take a financial interest in programming and sell those programs in syndication after the end of their network run, creating new incentives for networks to gain clearances for these programs and thus build the after-market for them.[56] This change

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pages at the beginning of 1995 to less than one single page.

[53] *See* Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, Report and Order (MM Docket 94-123, July 31, 1995).

[54] This change in focus is occurring already, with an NBC/New World venture preparing to launch an owned program in the access period. *See* S. Coe, *NBC/New World Take Aim at 'ET,' 'Extra'*, BROADCASTING & CABLE, Aug. 28, 1995, at 8. The program is guaranteed 36 percent clearance due to carriage on NBC and New World stations, and "immediate work will involve lining up station groups to clear the show". *Id.*

[55] *See* Review of the Syndication and Financial Interest Rules, Report and Order (MM Docket 95-39); *see also* Review of the Syndication and Financial Interest Rules, Second Report and Order, 8 F.C.C. Rcd. 3282, *recon. granted in part*, 8 F.C.C. Rcd. 8270 (1993), *aff'd sub nom.* Capital Cities/ABC v. Federal Communications Comm'n, 29 F.3d 309 (7th Cir. 1994).

[56] The Affiliates have agreed with the liberalization of the fin/syn rules because we believe that an increase in the financial benefits that flow from a program to the network will permit the networks to produce higher quality programming for the benefit of the entire system. In the context of the overall changes in the marketplace and the changes proposed in the *Notice*,

presents networks with a compelling incentive to use their substantial influence to gain even more comprehensive clearances.

- **National Multiple Ownership.** Commission rules have preserved diversity by generally limiting the ownership of television broadcast stations by any one company to a maximum of 12 television stations with no more than 25 percent of the national audience.[57] The Commission and both Houses of Congress have proposed eliminating the 12-station maximum and increasing the audience-reach cap substantially,[58] changes that will increase greatly the influence of television networks.[59]
- **Attribution of "Non-Controlling" Network Interests.** In the past, networks were limited in their ability to acquire less-than-controlling but still influential ownership interests in affiliates because the provision of programming rendered those interests "attributable" toward national multiple ownership limits. The Commission recently has limited the

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however, we do harbor very serious concerns about the impact of this significant change in regulatory structure on the networks' behavior in seeking to induce affiliates to clear programs. These concerns are increased exponentially if strong network-affiliate rules do not guard the right to reject network programming.

[57] *See* 47 C.F.R. § 73.3555(e)(10 (1994). These rules have been justified, properly in the Affiliates' opinion, on grounds that they foster both competition and a more diverse national industry. *See, e.g.*, United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Associated Press v. United States, 326 U.S. 1, 20 (1945).

[58] *See* Review of the Commission's Regulations Governing Television Broadcasting, Notice of Proposed Rule Making (MM Docket 91-221, Jan. 17, 1995) (30 percent cap with escalator); *see also* H.R. 1555 (35 percent cap); S. 652 (35 percent cap).

[59] *See* Comments of the Network Affiliated Stations Alliance, MM Docket 91-221 (May 17, 1995).

vitality of this doctrine,[60] although it is considering strengthening its attribution policies in other respects.[61]

- **Network Control of Advertising Rates/Network Advertising Representation.** The Commission has proposed repealing rules that prohibit networks from controlling affiliates' advertising rates and representing stations in the sale of advertising,[62] changes that would result in networks possessing even greater influence over affiliates.[63]
- **Filing of Network Contracts.** The Commission has proposed eliminating its rule requiring network affiliation contracts to be filed,[64] a content-neutral and minimally burdensome rule that permits affiliates to have access to information on a footing equal to that of the networks.[65]

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[60] *See* BBC License Subsidiary, L.P., Memorandum Opinion and Order, (FCC 95-179, April 27, 1995).

[61] *See* Review of the Commission's Regulations Governing Attribution of Broadcast Interests, Notice of Proposed Rule Making (MM Docket 94-150, Jan. 12, 1995). We wholeheartedly support the Commission in its efforts to ensure its attribution standards are not utilized to evade the operation of its national multiple ownership rules.

[62] Review of the Commission's Regulations Governing Broadcast Television Advertising, Notice of Proposed Rule Making (MM Docket 95-90, June 14, 1995).

[63] *See* NASA *Ex Parte* Presentation, MM Docket 95-90, Oct. 4, 1995; Comments of the ABC and CBS Television Network Affiliate Associations, MM Docket 95-90, August 28, 1995.

[64] *See* Amendment of Part 73 of the Commission's Rules Concerning the Filing of Television Network Affiliation Contracts, Notice of Proposed Rule Making (MM Docket 95-40, April 5, 1995).

[65] *See* Comments of NASA, MM Docket 95-40, June 12, 1995.

- **Other Network Rules.** The Commission already has eliminated the "network station ownership" rule, 47 C.F.R. § 658(f), and the "secondary affiliation" rule, 47 C.F.R. § 658(l).[66]

These changes, and other forces within the broadcast industry, have provoked a staggering reordering of the television marketplace. In particular, the networks have been swift in reorganizing to take advantage of the new opportunities available under the new rules. The net result has been that networks that already were very large businesses now are massive entertainment conglomerates poised to acquire even more broadcast properties and to expand into other media that can reach affiliates' audiences in competition with affiliates (such as cable networks, satellite programming, pay-per-view and even telephone company video systems in the case of the part-Disney-owned Americast consortium).[67] Companies that were solely network organizations when the three rules under review here were drafted are now owned (or soon will be owned) by three of the largest and most powerful companies in the world: Disney, Westinghouse and General Electric. This change in industry and regulatory structure has created a new breed of more powerful, vertically integrated studio-networks that will have an increased emphasis on promoting universal clearance of network programming.[68] The reach and power of these

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[66] *See* Review of the Commission's Regulations Governing Television Broadcasting, Report and Order (MM Docket 91-221, March 7, 1995).

[67] As NERA notes, it is significant that "cable has the potential to affect affiliates adversely by serving as a possible alternative distributor of network programming." *NERA Study* at 6.

[68] *See* Jensen, *'What's Up, Doc?' 'Vertical Integration'*, WALL STREET JOURNAL, Oct. 16, 1995, at B1 ("Warner and other big producers have been moving rapidly and aggressively toward vertical integration — controlling both the programming content and the distribution systems to get that programming to the public").

studio-network conglomerates dwarf the characteristics of the network organizations that initially were sought to be regulated by the rules that are the subject of this docket.[69]

These new studio-networks, not surprisingly, likewise have a new agenda. Because the Commission now will permit networks to take financial interests in programming and market that programming after the end of a network run (even in an access period that had been dedicated to local programming decisions), networks are increasingly demanding that all network programs be cleared. These demands are entirely logical and, in light of the new financial and ownership structure of the networks, completely responsible to the networks' shareholders. But uniform clearances across a country as large and diverse as the United States undermines the central character of our broadcast system; without firm protections for the right of affiliates to control their own stations, these new studio-networks will have the incentive and the ability to thwart affiliates' attempts to be responsive to their unique communities of license.

Changes in ownership rules, too, alter the bargaining position of networks and affiliates in favor of the network. Because the networks likely will be able to own more stations in the near future (and, under existing rules, have been able to have highly influential minority ownership interests in some affiliates), network programs will be able to achieve clearance to more than one-third of the nation

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[69] "The media business is turning Japanese in structure at a time when the Japanese are turning their backs on Tinseltown. At least if the Disney-CapCities deal is any indication, showbiz may come to be dominated by a handful of industrial alliances — like the vertical monopolies in Japan that are called keiretsus." Brodie, *Call of the Keiretsu: Can U.S. Showbiz Thrive as a Japanese-Style Cartel?*, VARIETY, Aug. 7-13, 1995, at 1; *see also* M. Oneal, *Disney's Kingdom*, BUSINESS WEEK, Aug. 14, 1995, at 30 (Disney purchase of Capital Cities/ABC give it "a guaranteed platform for its first-run syndication programs . . . as well as a platform to advertise other Disney properties from theme parks to films").

relying solely on the networks' own stations.[70] This new and enhanced ability to singlehandedly *create* identifiable programming franchises inexorably leads to the strategy of *maximizing* these franchises once they have been developed. This strain, in turn, translates directly into efforts to ensure uniform and universal carriage of these programs throughout the United States. As one party intimately involved in the creation of one new network-owned program colorfully observed, "If the network O&Os or stations within these new alliances really want to flex their muscles, they can kill you."[71]

In an overall sense, the regulatory changes of the past year have freed the networks to pursue a staggering array of new financial strategies. They have not, however, freed affiliates to do more than struggle to maintain a degree of parity in a bargaining relationship that increasingly favors the networks. To now eliminate the very essence of the network-affiliate rules — three non-intrusive rules that safeguard broadcast licensees' obligation to program in response to their communities of license — would grant the networks a virtual stranglehold over the network-affiliate system. This would be a loss for affiliates, to be sure, but the greatest loss would be felt by the American public, which would be deprived

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[70] Even before the mergers of Capital Cities/ABC with Disney and CBS, Inc. with Westinghouse, the networks could cover substantial amounts of the population with their owned stations. ABC could reach 24.59 percent with its owned stations and 27.91 percent including its minority interests in affiliates. CBS could reach 23.46 percent with its owned stations and 27.46 percent with its minority and partnership interests (and with Westinghouse, will reach some 33 percent of the country with its owned stations). NBC can reach 21.53 percent with its owned stations and 23.44 percent with its minority interests and pending acquisitions. And Fox today reaches 19.57 percent with its owned stations and *38.44* percent with its minority interests and pending acquisitions. *See* Comments of NASA, MM Docket 91-221, Exhibit 1 (May 17, 1995).

[71] T. Tyrer, *NBC O&Os Drop 'Extra' from Access*, ELECTRONIC MEDIA, August 28, 1995 (comments of president of syndication company concerning decision of NBC stations to launch an NBC-New World entertainment program in access and cease carrying a Time-Warner program).

of the benefit of the local/national partnership that has defined a system of broadcasting that rightfully is the envy of the world.

B. The Cumulative Impact of Subjecting the Three Essential Network-Affiliate Rules to Piecemeal Dismemberment Would Improperly Consolidate Network Control Over Local Affiliates.

The network-affiliate regulations, "as well as the network practices at which they are aimed, are interrelated."[72] As the Commission has long recognized, "the various [network] practices we have considered do not operate in isolation; they form a compact bundle or pattern, and the effect of their joint impact upon licensees necessitates the regulations even more urgently than the effect of each taken singly."[73] For these reasons, a coherent package of protections has developed over the years that should be retained as a whole.

The effect of the *Notice*'s proposed rule changes, taken cumulatively, would render it impossible for local affiliates to exercise effective local control over their own broadcast stations. Consider, for example, the effect of permitting a network to option a block of time in an environment in which an affiliate is prevented by federal regulation from exercising their current right to preempt network programming. The network could select a program of its own choosing up to the last minute, preventing the affiliate from having any effective control over the time period to be programmed. The bases on which the affiliate could preempt the program would be so narrow (and the burden of justifying the preemption to the network and, ultimately, to the Commission so great) that the affiliate would have no effective choice but to broadcast the program. Consider,

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[72] National Broadcasting Co. v. United States, 319 U.S. 190, 196-97 (1943).

[73] *Chain Broadcasting Report* at 75.

in addition, that if the proposed changes in the "exclusive affiliation" rule are adopted and networks coerce affiliates into signing exclusive contracts, affiliates that otherwise might have another network to which to turn for programming to effectuate such a last-minute preemption would have that alternative stripped away. It is not difficult to spin out other equally plausible scenarios that would result from adopting the proposals in the *Notice*. Clearly, the cumulative impact of eviscerating all three essential network-affiliate rules simultaneously would permit networks to consolidate control over their affiliates in a manner that would harm diversity, competition and viewer choice.

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In short, the acknowledged changes in the television broadcasting marketplace, both accomplished and incipient, have generated an atmosphere of instability that warrants extreme caution in considering changes to the network-affiliate relationship. The three rules in question, additionally, are part of an integrated whole that cannot rationally be subject to piecemeal dismemberment. In light of the spectacular changes in the communications landscape in the past year, altering the essential rules that govern the network-affiliate relationship would be a dangerous gambit indeed. The Commission should preserve the rules.

IV. THE COMMISSION'S PROPOSED MODIFICATIONS TO THE TERRITORIAL EXCLUSIVITY RULE MAY BE ADOPTED SO LONG AS EXISTING AGREEMENTS ARE NOT UNDERMINED.

The Affiliates generally concur with the *Notice*'s proposal to reform the "territorial exclusivity" rule.[74] But we note, as we did in 1991, that established relationships have grown around this long-standing rule:

> Whatever one's view of the need for the rule or the soundness of the rule's rationale at the time it was adopted, the Commission should be aware that hundreds of stations have been built, purchased and operated in reliance upon it. There are many markets in which smaller affiliates are "overshadowed" by larger stations which, in concert with the networks, might succeed in depriving the smaller station of its affiliation. Because of the importance of maintaining effective local programming voices in the overshadowed communities, not to mention the many millions of dollars at stake, any alteration of this rule should be approached with extreme caution.[75]

We hold to this view today. Although we believe the Commission's proposal may be adopted consistently with the public interest, we urge due consideration for the comments of any smaller or overshadowed stations that may bring particular circumstances to the Commission's attention.

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[74] The "territorial exclusivity" rule, 47 U.S.C. § 73.658(b) (1994), prohibits contracts, arrangements, or understandings between a network and an affiliate which "prevent" or "hinder" (1) another station in the affiliate's local community from broadcasting network programs that are rejected by the affiliate station; or (2) other stations that are not located in the affiliate's community from broadcasting any program that is offered by the network. This rule does not prohibit a network from arranging to give an affiliate "first call" on programming within its community for the network's programs.

[75] Reply Comments of NASA, Review of the Policy Implications of the Changing Video Marketplace at 7 n.13 (MM Docket No. 91-221, Dec. 19, 1991).

We also believe that the Commission's proposal to extend the scope of exclusivity to the station's DMA is sound in the main. The rule should track market realities and, for the most part, the industry defines its markets by DMAs. The Commission should be aware, however, that all DMAs are not equal. There are some circumstances in which affiliates have invested substantially in defining a scope of exclusivity that differs from DMA lines. Most importantly, there are some DMAs in which two affiliates currently have established exclusivity rights to various portions of the market. We believe that it is not appropriate to require the disruption of existing, long-standing contractual relationships in the process of modifying the rule going forward. In circumstances in which DMAs have not been an appropriate measure for exclusivity — particularly instances in which more than one affiliate operates in the same DMA — existing contractual agreements for the scope of exclusivity should be grandfathered.

V. THE AFFILIATES AGREE THAT EVENTUAL REFORM OF THE DUAL NETWORK RULE IS IN ORDER.

The "dual network" rule prevents any one company from providing more than one broadcast network.[76] When the dual-network rule was adopted, the Commission legitimately was concerned about the coercive effects that could result from one company operating two "networks" and using that capacity to influence affiliates to accept programming. The marketplace has, in this respect, changed significantly. Companies provide multiple networks to American homes via cable, satellite and wireless cable (although there are, of course, important distinctions between those networks and free, universal over-the-air broadcast

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[76] The "dual network operation" rule, 47 U.S.C. § 73.658(g), prohibits an entity from operating more than one broadcast television network, unless the networks are not operated simultaneously or if there is no substantial overlap in the territories served by each network.

networks). And, most importantly, the Commission and the broadcasting industry are on the verge of implementing the most important technical development in a half-century of television-signal improvements — the introduction of advanced television.

When broadcasters have a digital channel and an analog channel, it will be necessary for networks to have the flexibility to provide appropriate "networks" for both channels. The dual-network rule, as currently composed, would prohibit that and should be modified appropriately. But we would not limit the flexibility of networks to providing solely a simulcast channel; there may be important differences of programming between a digital and an analog broadcast. Accordingly, when it is technically feasible for affiliates to carry more than one "network" on a full-time basis, we believe it would be appropriate to then permit companies to provide more than one network feed to affiliates.[77]

CONCLUSION

Regulatory reform is appropriate when it permits Commission policy to conform more closely to the marketplace. We have supported liberalization of PTAR, fin/syn and other rules on this basis. But in this docket, we are assessing an integrated set of three essential rules that is crucial to maintaining local affiliate autonomy. The balance of power among networks and affiliates has not changed, and the need for these rules continues unabated. A change in these rules, given the extraordinary flux in both the marketplace and the overall regulatory structure, would be unwise. We urge the Commission to retain the

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[77] New networks, including Warner Brothers and UPN, undoubtedly will have important perspectives on the current need for the dual-network rule, and we urge the Commission to take fully into consideration any benefits that retaining the rule might have on the emergence of new networks.

right-to-reject, option-time and exclusive-affiliation rules as they currently are constituted and to reject the recommendations of the *Notice*.

Respectfully submitted,

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BROADCAST TELEVISION NETWORKS AND AFFILIATES:

ECONOMIC CONDITIONS AND RELATIONSHIP — 1980 AND TODAY

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